

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION



BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
                                          )  
SACRAMENTO MUNICIPAL UTILITY ) Docket No. 50-312 (SP)  
DISTRICT )  
                                          )  
(Rancho Seco Nuclear Generating )  
Station) )

NRC STAFF RESPONSE TO CEC'S "MOTION . . . FOR  
RECONSIDERATION OR, IN THE  
ALTERNATIVE, FOR CERTIFICATION TO THE COMMISSION"

INTRODUCTION

In its October 5, 1979 Order Ruling on Scope and Contentions (at 2-4, 19-20) the Licensing Board ruled that, although off-site emergency planning issues were within the scope of this proceeding, such issues were not proper subjects for litigation in this proceeding because the Commission had published notice of its intent to undertake general rulemaking on the subject of emergency response planning. The California Energy Commission (CEC), one of the participants in this proceeding which had sought to raise such issues, moved the Licensing Board on October 24, 1979 to reconsider this ruling.

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For the reasons developed below, the Staff takes the position that:

1. The Commission's Advance Notice of Rulemaking on emergency planning issues does not preclude consideration of such issues in this proceeding.
2. The Board should, however, also reconsider its ruling that offsite emergency planning issues are within the scope of this proceeding and should find that these issues are not within the scope of this proceeding and that its exclusion of these issues should be sustained on this basis.

#### DISCUSSION

In ruling that it was precluded from considering offsite emergency planning in this proceeding the Licensing Board relied upon:

1. The Commission's Advance Notice of Proposed Rulemaking -- Adequacy and Acceptance of Emergency Planning Around Nuclear Facilities (44 Fed. Reg. 41483, July 17, 1979).
2. The line of Commission cases stating that licensing boards should not consider in individual licensing cases matters which are being considered (or are about to be considered) in rulemaking. Potomac Electric Power Co. (Douglas Point) ALAB-218, 8 AEC 79, 85 (1974); Vermont Yankee Nuclear Power Corp. (Vermont Yankee), ALAB-56, 4 AEC 930 (1972), affirmed ALAB-179, 7 AEC 159 (1974), reversed NRDC v. NRC, 547 F.2d 663 (D.C. Cir. 1976), reversed and remanded on other grounds sub nom. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978). See also Long Island Lighting Co. (Shoreham), ALAB-99, 6 AEC 53 (1973).

Recognizing the well-established doctrine that licensing boards should not consider in individual licensing proceedings matters which are being considered (or are about to be considered) in rulemaking, we believe that in this instance subsequent Commission actions have made it clear that the Advance Notice should not be read to preclude consideration of emergency planning in individual licensing proceedings.

The first such action is the Commission's Policy Statement -- Planning Basis for Emergency Responses to Nuclear Power Reactor Accidents, 44 Fed. Reg. 61123, October 23, 1979. The Policy Statement adopts the guidance contained in a joint NRC/EPA report "Planning Basis for the Development of State and Local Government Radiological Emergency Response Plans in Support of Light Water Nuclear Power Plants," NUREG-0396, EPA 520/1-78-016 (December 1978). The report contained recommendations for Emergency Planning Zones (EPZ) for plume exposure and for exposure for ingestion. The Commission directed its Staff "to incorporate the planning basis guidance into existing documents used in the evaluation of state and local emergency response plans to the extent practicable" and to "assist state and local governments in improving their emergency response capabilities at existing sites in the immediate future." The Policy Statement evidences a determination by the Commission that its Staff should continue with efforts aimed at upgrading emergency plans despite the pendency of the Commission's rulemaking.

The second such action is the Commission's Statement of Policy -- Modified Adjudicatory Procedures, November 5, 1979 (copy attached). In that statement

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the Commission announced that licensing cases could proceed on all issues, but that licensing board decisions would not become effective until the Appeal Board and Commission actions outlined in the statement had taken place. Thus, when the Commission's Advance Notice is read in conjunction with this statement, it becomes clear that the Advance Notice does not preclude consideration of emergency planning in individual licensing proceedings.<sup>1/</sup>

For the reasons developed above, we believe that the Advance Notice of Rule-making does not preclude the Board from hearing emergency planning issues in this proceeding. However, to say that the issue is not barred by the rule-making is not to say that it is nonetheless appropriate for consideration in this proceeding. We adhere to our earlier position that off-site emergency planning is beyond the scope of this proceeding and believe that if the Board chooses to undertake a reconsideration of its ruling excluding emergency planning issues from this proceeding it should reconsider its entire ruling on that subject. Thus, the Board should also reexamine the bases for its ruling that emergency planning issues are within the scope of this proceeding.<sup>2/</sup>

Our position on the proper scope of this proceeding, including our position on the emergency planning issues, is set forth in our August 27, 1979 brief.<sup>3/</sup>

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<sup>1/</sup> While the modified adjudicatory procedures adopted by the Commission on an interim basis do not apply to enforcement proceedings, such as the present case, (Statement of Policy, p. 1) we nonetheless believe that the conclusions expressed there are instructive in determining the effect of the Advance Notice.

<sup>2/</sup> See Niagara Mohawk Power Corp. (Nine Mile Point, Unit 2), ALAB-264, 1 NRC 347, 357 n. 17 (1975); Consumer Power Co. (Midland), ALAB-282, 2 NRC 9, 10 n. 1 (1975).

<sup>3/</sup> NRC Staff's Brief on the Scope of the Proceeding.

We enumerated (p. 7) six areas of inquiry which we believed were within the scope of the proceeding and took the position that offsite emergency planning did not fall within any of those categories. (p. 10).

With respect to scope, the Board ruled that:

In this proceeding, it will be appropriate to investigate questions concerning the propagation of a response [to feedwater transients] throughout the Rancho Seco system, where "system" includes the physical facilities as well as the organization and personnel who operate them.

Order Ruling on Scope and Contentions, p. 3. We do not quarrel with this articulation of scope, but believe that for the reasons set forth in our previous brief emergency planning falls outside the scope of this proceeding.

One argument of CEC in its motion requires further comment. CEC argues that this Board has jurisdiction to consider "all major safety-related issues" (p. 4, emphasis in original). We believe the Board correctly determined, however, that it had jurisdiction only over "all matters and issues which hinge upon responses to feedwater transients." Order Ruling on Scope and Contentions, p. 3. CEC argues that the transcript of the Commission's July 11, 1979 meeting (called to consider whether the Rancho Seco Order of June 21, 1979 should be amended to specify "management competence and control" as an issue within the scope of the Rancho Seco proceeding) demonstrates that the Commission held a broad view of the jurisdiction of this Board. The Commission there relied upon footnote 3 of the Board's July 3, 1979 "Order for Filing of Amended and Supplemented Requests for and Notice of Prehearing Conference," which stated, in part:

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The Commission has already identified in its June 21, 1979 Order the broad issues to be considered. Each requester for hearing can, of course, assert . . . that further issues should be specified as long as they are related to the action taken by the Commission in its May 7, 1979, Order.

The Commission's decision not to amend the order was based upon its view that management competence and control could be raised under the standard set forth in the Board's footnote. Tr. 5, 6, 9.

We do not read the Commission's transcript as broadly as does CEC. In our view, all that the Commission decided was that "whether management competence and control are adequate to provide reasonable assurance that the facility will respond safely to feedwater transients"<sup>4/</sup> was an issue "related to the action taken by the Commission in its May 7, 1979, Order." That determination does not resolve whether the Commission would also interpret off-site emergency planning as being "related" to the actions it had taken.

CEC has also moved that should the Licensing Board adhere to its ruling excluding emergency planning issues it should "seek certification to the Commission of the question of the applicability of the Douglas Point precedent." (pp. 3-4). The Staff interposes no objection to this request.

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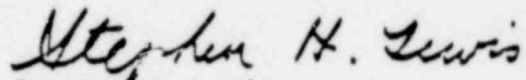
<sup>4/</sup> This is the language used by the Commission in the Davis Besse order and which was sought to be inserted in the Rancho Seco order. Toledo Edison Co. (Davis-Besse, Unit 1), Commission Order, July 5, 1979.

CONCLUSION

For the reasons set forth in this brief, the Staff requests the Licensing Board to take the following actions with respect to CEC's motion and this response:

1. rule that emergency planning issues are not precluded from consideration in this proceeding because of the Commission's "Advance Notice of Proposed Rulemaking;" and
2. rule that off-site emergency planning is beyond the scope of this proceeding.

Respectfully submitted,

  
Stephen H. Lewis  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 13th day of November, 1979.

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